IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9773 OF 2004

Sakhubai Vyankatswami Rampure
and others .. Petitioners
versus
Chandsaheb M. Qureshi & Ors. .. Respondents

...

Mr.Y.S. Jehagirdar with Shri G.S. Godbole for the petitioners.
Mr.I.M. Khairdi for the respondents.

CORAM : D.G. KARNIK, J
DATED : 18th June 2004.

ORAL JUDGEMENT :-

1. Rule. Shri Khairdi waives service on behalf of all the respondents. By consent, heard forthwith.

2. By this Writ Petition, petitioner-tenant

challenges the judgement and decree passed on 7th November 2003 by the Learned Addl. District Judge, Solapur in Civil Appeal No.173 of 2000 confirming the decree for possession passed by the trial court. The facts are briefly stated below:

By a registered indenture of lease dated 28th October 1963, Mohaddin Khajabhai Bepari (under whom the respondents claim as heirs) let out to Vyankatswami Rampure, the husband of petitioner no.1 and the father of petitioner nos.2 to 6, an open piece of land admeasuring 1035 sq.ft. forming a part of City Survey No.8717 bearing Municipal No.173 at Solapur (hereinafter referred to as the 'suit property') for a period of 30 years commencing from 8th July 1963 on the yearly rent of Rs.200/-. The petitioners were permitted to carry out construction on the suit property at their own cost. The petitioners had agreed to pay municipal taxes which would be assessed on account of carrying out of the construction by them. Venkatswami, through whom the petitioner's claim, was permitted to put the construction for own use or to sub let the super structure or any part thereof.

3. According to the respondents, the petitioners or their predecessor did not pay any rent to them during the entire period of lease of 30 years. After the expiry of the period of 30 years of the lease, by a notice dated 28th September 1993, the respondents demanded arrears of rent amounting to Rs.6,000/- and also called upon the petitioners to quit, vacate and deliver, vacate possession of the suit premises by removing the structures erected by them. On failure of the petitioners to comply, the respondents filed a suit bearing suit no.1160 of 1993 in the Court of Civil Judge, Solapur for possession and recovery of the arrears of rent.

4. The respondents claimed possession of the suit premises on the ground that the period of the lease was over and in any event, the lease was terminated by a notice to quit. They also claimed possession on the ground of default in payment of the rent and on the ground that the respondents required the suit premises reasonably and bonafide for their own use and occupation for business which they intended to carry out after erecting new construction in the suit premises.

5. The trial Court decreed the suit on the ground of default as well as on the ground of bonafide requirement. The trial Court held that greater hardship would be caused to the respondents by refusing to pass a decree than to the petitioners by passing the decree. The appellate Court confirmed the decree on all the counts. It held that the petitioners were defaulters in payment of rent. It also held that respondents required the suit premises reasonably and bonafide for their own use and occupation and greater hardship would be caused to them by refusing to pass a decree then to the petitioners by passing the decree. It therefore, confirmed the judgement of the trial Court and dismissed the appeal.

6. Learned counsel for the petitioners submits that the findings recorded by the Courts below are perverse and the Courts below have not taken into consideration the relevant evidence and the documents. The Courts below have wrongly ignored a previous lease dated 8th July 1963 resulting into perversity.

7. In the trial Court, the petitioners had

produced one unregistered document dated 8th July 1963, executed between Mohaddin Khajabhai Bepari, the predecessors in title of the respondents and Vyankatrao, the husband of the petitioner no.1 and others. The document purports to be an unregistered lease deed under which the suit premises were demised to Vyankatrao and others for a period of 30 years. It is stated in the said agreement that the petitioners would be entitled to carry out the construction at their own cost by spending not more than Rs.6,000/-, and that the amount so spend upto Rs.6,000/- would be adjusted in the rent. According to the petitioners, they have spent more than Rs.6,000/- for the construction and therefore, they were entitled to adjust the entire rent of Rs.6,000/- for a period of 30 years towards the said amount of construction. If the amount was so adjusted, the petitioners were not defaulters in payment of the rent and on the date of the notice, no amount was due from them.

8. Learned counsel for the petitioners also invites my attention to a recital in the registered lease deed dated 28th October 1963 in which it is stated that the lease commenced on 8th July 1963

which is the date of the earlier agreement dated 8th July 1963. He therefore, submits that there is an intrinsic evidence in the registered lease deed dated 28th October 2003 itself about the existence of an agreement/deed dated 8th July 1963. He therefore, submits that the trial Court ought to have relied upon the agreement/deed dated 8th July 1963. The trial Court has rejected the agreement dated 8th July 1963 on the ground that it was not proved and also on the ground that it was not admissible in evidence. In my view, the agreement dated 8th July 1963 and the terms and conditions written therein cannot be looked into for more than one reasons. Firstly, the agreement purports to be a lease for a period of 30 years on payment of yearly rent of Rs.200/-. Section 107 of the Transfer of Property Act reads as under:-

> **107. Leases how made-** A lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.
>
> All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.
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> Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both

> the lessor and the lessee.
>
> Provided that the State Government may from time to time, by notification in the Official Gazette,direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

As the lease purports to be for a period of 30 years, it could be created only by a registered instrument. Admittedly, the agreement dated 8th July 2003 is not registered. Secondly, an agreement of lease in excess of one year is also required to be compulsorily registered under section 17 of the Indian Registration Act. Admittedly, the document is not registered. Hence, under section 49 of the Registration Act, the document is not admissible in evidence. Thirdly, admittedly, the parties entered into a subsequent lease on 28th October 1963 which was duly registered under the Indian Registration Act. Most of the terms and conditions of the agreement dated 8th July 1963 and 28th October 1963 are identical. However, the condition regarding the adjustment of the rent towards the cost of construction of the building to be erected by petitioners is omitted in the registered lease deed

dated 28th October 1963. Thus, assuming that the parties had initially agreed for any adjustment, the term was modified by the subsequent lease deed dated 28th October 1963. Subsequent lease amounts to a novation. If the agreement is modified by a novation, it is the modified agreement which would govern the rights of the parties. It therefore, cannot be said that petitioners were not liable to pay any rent to the respondents as they had spent more than Rs.6,000/- for carrying out the construction on the suit property. There is yet another circumstance which goes against the case of the petitioners of the adjustment. According to the petitioners, they had paid to the respondents rent of Rs.2,400/- in cash and had produced a rent receipt (Exhibit 79) in the trial Court. If it not clear why they paid rent of Rs.2,400/- to the respondents if the entire amount of Rs.6,000/- spent by them for construction was to be adjusted toward the rent. The rent paid by the petitioners was only Rs.2,400/- as against the rent of Rs.6,000/- which was due for a period of 30 years. The petitioners thus, on their own saying were in arrears of rent of Rs.3,600/- which they had failed to pay despite the notice of demand.

9. It is not disputed that on or before the first day of hearing of the suit or even till the suit was decided and even during the pendency of the appeal, the petitioners have not deposited the arrears of rent and hence, the petitioners are also not entitled to a protection under the amended provisions of sub section (3) of section 12 of the Bombay Rent, Hotel and Lodging House Rates (Control) Act, 1947 (for short 'Bombay Rent Act'). Thus, the decree for possession concurrently passed against the petitioners by the two courts below on the ground of default is proper and correct.

10. Learned counsel for the petitioners submits that the trial Court has recorded a finding of fact, the needs of the respondents would be satisfied by passing a decree for possession only of 500 sq.ft. of open land out of the total land of 1038 sq.feet. The trial Court held that if a decree for possession of 500 sq.ft. of the premises was passed, the respondents could construct two or three shops to carry on the business and the shop of 500 sq.ft. would be enough for their needs. In paragraph no.22 of the judgement the trial Court observed :

> "Under these circumstances, if half of the portion i.e. admeasuring 500 sq.ft. is handed over to the plaintiff to construct atleast 2 - 3 shops for their business, their need would be satisfied. The defendant would not suffer hardship. They can reside in Sidhseva Peth and do business in the remaining portion in the suit property. Admittedly, if the partial decree is not passed, the plaintiff will suffer greater hardship."

The learned counsel for the petitioners submits that this finding recorded by the trial Court has not been specifically set aside by the appellate Court. The appellate Court has not considered whether there would be no hardship to either side by passing a partial decree for possession as was observed by the trial Court. He submits that it was imperative for the appellate Court to consider this aspect of greater hardship in view of the specific provision in sub section (2) of section 13 of Bombay Rent Act. In my opinion, the submission is misconceived. The suit premises were let out as open land. The structure standing thereon belongs to the petitioners i.e. the tenants. Possession of the suit property is sought as an open land by ordering the petitioners to remove their structure. Thus the case is covered by

clause(i) and not clause(g) of sub section (1) of section 13 of the Bombay Rent Act. Sub-section(2) of section 13 which requires the Court to consider the question of greater hardship and also consider whether no hardship would be caused to either party by passing a partial decree for possession applies only where the possession is sought under clause (g) of sub-section (1) of Section 13 of the Bombay Rent Act. It is not applicable when the case falls under clause (i) of sub-section(1) of section 13. In any event as the decree was also passed on the ground of default, there was no question of passing a partial decree.

11. Thus, the judgement of the appellate Court on both the issues is proper and correct, and needs no interference. Accordingly, the petition is dismissed with no order as to costs.

12. Rule discharged with no order as to costs.

13. At the request of the learned counsel for the petitioners, the respondents through their counsel agree not to execute a decree for possession for a period of eight weeks.

All concerned to act on a copy of this order duly authenticated by the Sheristedar.

D.G. KARNIK, J